**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**
**(Northern Division)**

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| BLANCA "LORENA" P. CEDILLOS-GUEVARA, *et al.*, | : | |
| Plaintiffs, | : | |
| v. | : | Civil Action No. GLR-14-196 |
| MAYFLOWER TEXTILE SERVICES CO., *et al.*, | : | |
| Defendants. | : | |

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO COMPEL DISCLOSURE OF ATTORNEY BILLING RECORDS PRIOR TO SETTLEMENT CONFERENCE

Defendants' Motion to Compel offers not a single on-point case to support their argument that Plaintiffs should be compelled to produce detailed billing records for a settlement conference while in the midst of this ongoing litigation. Time records provide a window into the attorneys' strategy and approach to a case, and include records of the topics of communications between attorneys and clients. They are privileged attorney work product, and in many cases, protected by the attorney-client privilege. As such, these records are generally not discoverable prior to the conclusion of litigation on the merits. Local Rule 109.2 and Appendix B thereto, on which Defendants mistakenly rely, support Plaintiffs' position that only total quarterly hours and fees, and not detailed billing records, must be produced to an opponent prior to judgment.

Defendants implicitly acknowledged that they are not entitled to detailed billing records at this stage of the case by not even asking for those records in their requests for production of documents. They did not ask because those records are not discoverable. No rule or procedure related to settlement conferences requires parties to disclose otherwise non-discoverable information to opposing parties simply because the parties have agreed to mediate.

The Defendants' primary argument – that because Plaintiffs have spent considerable time on the case to-date, the Defendants should be able to comb through their time records in advance of a settlement conference – is not a recognized exception to the work-product doctrine. The settlement conference in this matter will necessarily focus first on compensation for the Plaintiffs. Attorneys' fees will only come into play if the parties reach an agreement on damages for the class members. At that point, the parties can negotiate regarding various methods of resolving Plaintiffs' claim for attorneys' fees, and only then will the fee records Defendants now seek be discoverable. But at this point, when the merits of the case continue to be in dispute, the fact that Plaintiffs' attorneys have spent over 3,000 hours over the past two-and-a-half years – time necessitated by Defendants making the case as difficult as possible, including fighting conditional certification and amendment of the complaint, failing to produce discovery (resulting in one defendant being held in contempt), and filing motions such as this one, as well as by the large number of plaintiffs and defendants – is irrelevant and not grounds for requiring Plaintiffs to produce their time records.

While all of Plaintiffs' counsel's time to-date is properly included in the quarterly fee reports, that does not mean Plaintiffs will seek compensation for all of it. Once the Court enters judgment or the parties reach agreement on a settlement of the merits of the case, Plaintiffs will exercise their billing discretion (such as not seeking compensation for time they deem duplicative or excessive) and will apportion their time among the various Defendants (for example, only Mr. Abgaryan and his companies are responsible for the time related to his failure to produce documents and eventually being held in contempt). But Plaintiffs' counsel should not have to spend the considerable additional time required to review, redact, allocate time by task and by Defendant, and exercise billing discretion as to which fees to seek from which Defendant, before there is a settlement agreement on damages to be paid to the Plaintiffs.

For these and other reasons discussed below, the Court should deny Defendants' motion.

## I. Defendants' Motion is Premature and Is Not Authorized by the Local Rules.

Although they state that their Motion to Compel is filed "pursuant to Local Rule 109.2 and Appendix B," Defendants do not and cannot point to any authorization in the Local Rules for production to an opposing party of detailed time records prior to a judgment on the merits of a case. Neither Local Rule 109.2 nor Appendix B supports Defendants' request for detailed fee records during the course of litigation. The Local Rules provide for two different types of production: a bare-bones quarterly report of total hours and fees during the course of litigation (i.e., at the current stage), and a detailed production as part of a motion for attorneys' fees by a prevailing party (a stage that, while Plaintiffs anticipate achieving eventually, they have not yet reached).

Local Rule 109.2 governs "Motions Requesting Attorneys' Fees." The Rule does not contemplate or allow for motions to compel production of billing records *before* the Court enters judgment or before a fee petition has been filed. *Id.* Indeed, Rule 109 is titled "Post-Trial Proceedings." *Id.* Rule 109.2(a) sets out a timetable for filing a motion for attorneys' fees ("within fourteen days of the entry of judgment"). The Rule requires a *prevailing party* in a case involving an award of attorneys' fees to describe in a detailed memorandum the work performed for which fees are being sought, broken down by task, and listing the amount of time attorneys spent on each task. L.R. 109.2(b). This encourages a prevailing party to review the costs of representation and make sure that all fees sought by the party are reasonable. This is not a trivial or inexpensive process, but it allows prevailing parties to seek recovery of all of their reasonably incurred fees. But here, there is no prevailing party – no dispositive motions have even been filed, and a settlement conference has not yet been held. Thus, Local Rule 109.2 is simply inapplicable at this stage of litigation.

Appendix B, too, indicates that Defendants' Motion is premature. Appendix B delineates the format a fee-seeking party is required to use in a fee application *filed after a judgment has been entered*. App. B(1)(b). It also contains a separate provision outlining a fee-seeking party's disclosure obligation *during the course of litigation*: submission of quarterly statements. App. B(1)(c). Throughout the course of litigation, Plaintiffs have submitted quarterly billing reports to Defendants as required by this rule.

Finally, Appendix B.1(d) provides that a judge or mediator presiding over a mediation may require all parties (not just one) to turn over to the judge or mediator (but not to the other side) "statements of time and the value of that time in the "litigation phase" format provided in Guideline 1.b." The fact that section 1(d) allows a judge or mediator to require "all parties . . . to turn over to that officer (or mediator) statements of time and the value of that time," but includes no similar provision to require turning over any such records to the adverse party, indicates that no such power exists. It is also worth noting that Defendants do not seek to invoke Appendix B.1(d), which would require all parties to turn over those records to the mediator at this point. The effort involved in sorting time records into the "litigation phase" format to provide statements of the time and value of time in each category will not advance settlement efforts and is not worth the time or resources required at this point, prior to a settlement on damages.

Although Defendants now argue that they want more than the information provided in the quarterly fee letters pursuant to Appendix B.1.c, Plaintiffs' submissions are consistent with the plain language of the Local Rules for this stage of litigation. Anything above or beyond these reports is outside the scope of Appendix B. No language in Appendix B supports Defendants' claim to a right to see Plaintiffs' detailed time records at this stage of the case.

## II. Because the Fee Records Disclose Attorney Work Product and Reflect Attorney-Client Communications, Plaintiffs Should Not be Compelled to Produce Them at This Stage in the Litigation.

Plaintiffs should not, at this stage of litigation, be forced to produce billing records, which disclose attorney work product and reflect privileged attorney-client communications, nor should they be put to the huge task of reviewing and redacting hundreds of pages of time records. Defendants' assertions that fee records are not protected during litigation misstates settled law.

The detailed billing records sought by Defendants disclose attorney work product. They record how Plaintiffs' counsel have spent their time on this case, including attorney-client meetings and other communications with Plaintiffs, and disclose facts and theories that counsel have investigated or chose not to investigate, all of which this Court and this Circuit protect during these early stages of litigation. The work-product doctrine protects "a lawyer's 'mental impressions, conclusions, opinions, or legal theories.'" *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 731 (4th Cir. 1974) (quoting Fed. R. Civ. P. 26(b)(3)). This Court has held that the doctrine is implicated by billing statements when those records contain references revealing "mental impressions, conclusions, opinions or legal theory when the case [is] ongoing and counsel [has] additional papers to file and actions to take." *U.S. ex rel.Wiser v. Geriatric Psychological Servs., Inc.*, 2001 WL 286838, at *1 (D. Md. Mar. 22, 2001).

The Court in *Wiser* found that several records at issue in that case were privileged and thus could only be turned over to opposing counsel in redacted form, *even during the fee petition stage*. *Id.* at *2. Other records, the Court found, contained work product during the litigation phase of the trial but became public record after litigation concluded, a position bolstered by defendants' due process right to examine the plaintiffs' fee request on reasonableness grounds. This case is still in the active litigation phase – any disclosure of privileged or work product material could harm Plaintiffs' case.

Defendants incorrectly assert that it is "settled law that attorney billing records are not privileged." Dkt. 180 at 3 (citing *In re Grand Jury Subpoena*, 204 F.3d 516, 520 (4th Cir. 2000) as well as provisions of the Local Rules involving disclosure of billing records *post-judgment*). Defendants mischaracterize the Fourth Circuit's reasoning in *In re Grand Jury Subpoena*. In that case, the Court stated only that the "the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege." *Id.* (quoting *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir.1999) (emphasis added)). That opinion did not address the production of detailed time records, but the *Chaudhry* court did. There, the Fourth Circuit stated that "correspondence, bills, ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the privilege." 174 F.3d at 402 (quoting *Clarke v. Am. Commerce Nat'l Bank*, 974 F.2d 127 (9th Cir.1992)). The Fourth Circuit held that disclosure of even redacted portions of appellee's billing records "would divulge confidential information regarding legal advice [and] they constitute privileged communication and, as such, should not be disclosed." *Id.* at 403.

### III. Plaintiffs' Alternative Fee Disclosure Proposals Will Adequately Equip Defendants to Assess Plaintiffs' Request for Fees When Such a Request is Made.

Parties may, as they have in this case, agree to mediate a dispute, the resolution of which would involve legal fees. Agreeing to participate in mediation is no guarantee that a settlement of any kind will occur, nor does it waive any privilege or create any additional discovery obligations. If it did, it would create an incentive to engage in mediation for the purpose of obtaining additional discovery. To require disclosure of detailed billing records that may reveal litigation strategy or confidential material would ignore the possibility that mediation may be unsuccessful, in which case the litigation will resume. If Defendants' motion were granted, they would have obtained detailed descriptions of how Plaintiffs' counsel spent their time, which they could use to their advantage when litigation resumes.

The simplest way to deal with this situation is to initially mediate only on the substance of the case and Plaintiffs' damages. If and when the parties reach agreement on damages for the Plaintiffs, they can then either mediate or litigate the amount of reasonable fees.

Although producing their detailed fee records at this stage would hurt their case and is premature, Plaintiffs understand that their attorneys' fees are of concern to Defendants and may impact settlement negotiations. Therefore, Plaintiffs have voluntarily offered several alternatives to Defendants to provide access to Plaintiffs' attorney fee information as necessary. These suggestions would permit Defendants to review Plaintiffs' attorneys' fees and make arguments, if necessary, as to the "reasonableness" of such fees. Plaintiffs' counsel offered to bring hard copies of their legal bills to the scheduled mediation, in accordance with Appendix B(1)(d), to be reviewed by the magistrate judge (and reviewed by opposing counsel if the parties reach agreement on damages). *See* Dkt. 180, Ex. B, E-mail from Lucy B. Bansal to Defendants' Counsel (May 26, 2016, 11:35 a.m.). Making these bills available to all parties under the supervision of a mediator satisfies both the Local Rules of this Court and relevant precedent. Moreover, providing billing records in this manner will afford Defendants ample opportunity to dispute Plaintiffs' fee demand. If Plaintiffs and Defendants then reach an impasse with regard to fees, those fees could be decided by the Court according to the Local Rules on which Defendants rely in their Motion.

Plaintiffs also offered "to provide a breakdown of our fees in two figures: before and after the First Amended Complaint." Dkt. 180, Ex. B, E-mail from L. Bansal to Defs.' Counsel (May 2, 2016, 5:39 p.m.). That offer was meant to provide additional information to late-joining Defendants, who are likely to have a stronger opposition to fees incurred before they were added to the case.

Plaintiffs would also be amenable to additional breakdowns of their fees. For example, when they make their settlement demand, including a demand for attorneys' fees, they will summarize the time they have removed from their request and identify categories of time that apply only to one defendant or group of defendants (i.e. time spent on motions that relate to only some, but not all, defendants).

Finally, Plaintiffs have provided Defendants with quarterly updates in accordance with Appendix B of the Local Rules. Such fee updates ensure that Defendants have a running tally of the attorneys' fees at stake and their potential liability resulting from this action. Those quarterly fees are more than other courts require, and are all that Plaintiffs are required to produce in advance of settlement or judgment in this Court.

## IV. Conclusion

For the foregoing reasons, the Plaintiffs request the Court deny Defendants' Motion to Compel Disclosure of Attorney Billing Records Prior to Settlement Conference.

Respectfully submitted,

__________/s/_______________________

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on July 29, 2016, a copy of the foregoing was served via this Court's CM/ECF system on all parties of record, and was sent via first class mail to:

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_______/s/________
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